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No. 80-2209

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, *Petitioner*,

v.

ALBERT ROSS, JR., *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

I. Whether a warrantless search, based upon a finding of probable cause, of a closed, unsealed paper bag, found in the trunk of respondent's automobile, which had been removed from the scene of arrest, to the police station, was permissible under the Fourth Amendment.

II. Whether this Court should reconsider *Robbins* v. *California*, 453 U.S. ____ (1981).

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STATEMENT OF THE CASE

Respondent, Albert Ross, Jr., was convicted in a jury trial of one count of Possession of Heroin with Intent to Distribute, in violation of 21 U.S.C. 841(a). He was sentenced to a term of imprisonment of from twenty (20) months to five (5) years, followed by a special parole term of six (6) years. The conviction was reversed by the United States Court of Appeals for the District of Columbia Circuit, both by a panel and *en banc*.

At a pre-trial motion to suppress evidence hearing conducted by the District Court on February 9, 1979, the following evidence was adduced:

Detective Charles J. Marcum, of the Narcotics Branch of the Metropolitan Police Department received a telephone call from an informant who related that a person known as "Bandit" was observed making a narcotics transaction from the trunk of a car. The vehicle was described as a purplish maroon Chevrolet Malibu parked in front of 439 Ridge Street, N.W., Washington, D.C. After receiving that information, Detective Marcum, together with Detective Cassidy and Sergeant Gonzales responded to the area and observed the vehicle. (H. Tr. 4).[1]

Marcum related that the informant did not have the correct license number of the car, but that it had District of Columbia license plates. Marcum obtained a listing of the tag number on the car and it came back listed to an Albert Ross. The name was run through the WALES NIC computer and came back with a description of Albert Ross, plus the alias "Bandit," (H. Tr. 5).

The Detectives made two passes through the street, the first time getting the tag number. (H. Tr. 7) They went several blocks away and circled the area. They had gone for about five minutes and returned coming down 4th Street off of N Street and at that time observed the vehicle make a right-hand turn off

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[1] "H. Tr." refers to the transcript of the suppression hearing.

of Ridge Street onto 4th street. The vehicle was stopped in the 1200 block of 4th Street. Respondent was ordered out of the car. (H. Tr. 8)

At about the time Respondent was taken out of the car and was being patted down, Sergeant Gonzales opened the passenger door of the car and stated "I found a gun." A subsequent search was made on the scene of the trunk of the vehicle and Marcum testified that a paper bag containing thirty quarter packets of heroin and a maroon purplish color leather purse containing about $3,000 in cash was found. Marcum stated that Detective Cassidy opened the trunk and that Marcum had an opportunity to observe what was in the trunk. (H. Tr. 10)

Respondent was transported to the Narcotics Branch and Detective Cassidy drove the vehicle to Police Headquarters where a further search of the trunk was made in the basement of Police Headquarters. (H. Tr. 11)

When Marcum arrived at the scene, the vehicle was unoccupied and he saw no one on the street who matched the description given by the informant. The vehicle was not examined on either of the two times that the officers saw it parked. (H. Tr. 30)

As to the arrest of respondent, Marcum stated that he was searched and that $345 in cash was in his pocket. (H. Tr. 38) He did not know whether the trunk was opened before the pistol was seized. He looked in the trunk and saw the bag and the red leather purse was laying along side. (H. Tr. 40) Detective Cassidy opened the bag, the items were seized from the vehicle and put back for transportation down to headquarters. (H. Tr. 41) Respondent was in custody on the scene. (H. Tr. 42)

On re-direct examination, Marcum stated that the respondent was handcuffed right after the gun was found. (H. Tr. 46)

The next witness at the motion's hearing was Sergeant Raymond Gonzales who testified that after the car was stopped,

he went to the passenger side of the car. (H. Tr. 48) After respondent was taken out of the car, he saw a .22 calibre bullet laying on the front seat. He searched around by the seat, underneath and in back and then went in to the glove box and found the gun. (H. Tr. 49)

He further stated that after he seized the weapon, respondent was taken out of the car. (It is not clear from the testimony, the sequence) He stated that he told Marcum and Cassidy about the gun. They then took the keys and opened the trunk. (H. Tr. 50)

On cross-examination, Gonzales stated that nothing else was seized from the interior of the car by him, and he did not find anything in the nature of contraband in the interior of the car. (H. Tr. 51) He further testified that he did not look in the trunk and never saw anything in the trunk or removed from the trunk. (H. Tr. 52)

Gonzales testified that he first saw the items allegedly seized by Detective Cassidy at police headquarters. (H. Tr. 53)

Pertaining to the arrest and search on the scene, Gonzales testified that he did not believe that respondent was handcuffed until after he told the officers about the gun and that was before the trunk was opened. (H. Tr. 59)

The next witness at the motion's hearing was Detective David Cassidy of the Metropolitan Police Department. He testified that after respondent's vehicle was stopped, and after respondent was outside of the vehicle, he and Marcum began a search of his person and a short time later, Gonzales stated that he had found a pistol in the glove box of the car. (H. Tr. 66) Cassidy then stated that respondent was handcuffed and the keys were taken from the ignition and the trunk opened. He stated that Marcum had told him that he had information that heroin was in the trunk. (H. Tr. 66)

Cassidy then stated that he observed a brown paper bag in the trunk on the left side, he opened it and saw a number of glassine

bags containing a white powder. He closed the trunk, got in the car and drove it to police headquarters. (H. Tr. 69)

After arriving at police headquarters, he parked the car in the basement went upstairs and got a case to put the evidence in, went directly downstairs and thoroughly searched the car. He opened the trunk and seized the bag containing thirty glassine packets containing a white powder. Alongside the bag was a red leather handbag with a zipper. He unzipped the bag and found a large quantity of money. The rest of the trunk was searched, but no other evidence was seized. (H. Tr. 67)

Cassidy related the events concerning the first sighting of the car and the cruising of the neighborhood. After seeing the vehicle make the right turn on Ridge onto Fourth Street south, the car was pulled over and respondent was told to get out. (H. Tr. 78) After respondent got out of the car he was searched, but nothing "illegal" was taken from his person. (H. Tr. 80) After the trunk was opened, the paper bag was seen. It was closed at the top and Cassidy opened the bag. (H. Tr. 82) The bag was not removed from the trunk. (H. Tr. 82) He did not do anything other than open and look in the bag. (H. Tr. 83)

After getting to police headquarters, he returned to the vehicle after getting a container in which to put evidence and was accompanied by two other officers. The trunk was opened and the paper bag and the red handbag were seized. (H. Tr. 85) He stated that at the scene of the arrest the bag containing the money was never opened. (H. Tr. 86)

Recapitulating the events at the time of the trunk opening at the scene of arrest, Cassidy testified that he opened the trunk, observed the bag, opened the top, looked inside, observed the packets of white powder and closed the trunk. (H. Tr. 91)

Cassidy further related that respondent was ordered out of the car so that he could be arrested and a search could be conducted of the vehicle. (H. Tr. 92)

The above was essentially the evidence upon which the issues involving the search and seizure in this case arose.

The brief for the petitioner sets out the course of this case through the appellate processes below. The respondent has nothing further to add in this connection.

SUMMARY OF ARGUMENT

The respondent, in setting forth his arguments as to why the judgment of the *en banc* Circuit Court opinion should be affirmed has divided his argument into two distinct parts. The first part is directed to the issue as to whether *Robbins* v. *California*, should be reconsidered. The second part deals with the argument that the Fourth Amendment protects the types of containers found in the circumstance of the present case. Respondent feels that consideration of the reconsideration issue logically precedes consideration of the second part for the reasons that an analysis of the authorities which formulate the so-called "automobile exception" to the warrant requirement beginning with *Carroll* v. *United States, infra,* to *Robbins, supra,* places the issues in this case in a proper prospective.

A. Respondent contends that *Robbins* v. *California, infra,* was properly decided and that its result should be reaffirmed by this Court with the hope that a majority, if not a unanimous opinion, will emanate.

This Court has consistently recognized and reaffirmed the proposition that any search is *per se* unreasonable unless conducted pursuant to a warrant secured from a neutral and detached judicial officer that satisfies the warrant clause of the Fourth Amendment.

That certain few, but well delineated, exceptions have evolved from the above requirement. One of the exceptions is the so-called "automobile exception" which had its genesis in the case of *Carroll* v. *United States, infra*. Warrantless searches

of vehicles have been sanctioned, where the vehicle has been stopped on the highway by law enforcement officers on the probable belief that the vehicle contained contraband. This exception was based upon the inherent mobility of the vehicle predicated upon the theory that a possibility of the vehicle being removed and evidence destroyed sanctioned the warrantless search and seizure.

That the exception was expanded by this Court in the case of *Chambers* v. *Maroney, infra,* which would permit the warrantless search of a vehicle not only on the highway where the seizure of the vehicle took place, but also later at a police station.

Respondent views *Chambers, infra,* as constituting a change in the Court's direction in this area; that "inherent mobility" was no longer the sole factor and that searches could be conducted of vehicles at another place for the safety or convenience of the officers even though there was opportunity to obtain a warrant and possibility of removal or destruction of evidence was remote or non-existent.

That in addition to the "inherent mobility" factors, two other factors have evolved in the case law. The first is the "diminished expectation of privacy" concept as it pertains to automobiles and the second is a state or governmental regulation factor. *Cady* v. *Dombrowski, infra; South Dakota* v. *Opperman, infra;* and *Cardwell* v. *Lewis, infra.*

That *United States* v. *Chadwick, infra,* and *Arkansas* v. *Sanders, infra,* sought to make a distinction between certain items seized from a motor vehicle and the vehicle, itself, on the ground that there is a greater expectation of privacy in certain types of containers (being repositories of personal effects) and the vehicle, itself, requiring the intervention of a judicially sanctioned warrant.

The plurality opinion in *Robbins, infra,* while reaffirming the warrant preference as established in prior cases of this Court, was said to establish a "bright line" rule that would require officers to obtain warrants for "insubstantial containers" in which there was no reasonable expectation of privacy. The dissenting opinions would extend the "automobile exception" to the warrant requirement to all property found within the vehicle.

Respondent contends that the "automobile exception" to the warrant requirement should be based solely on the inherent mobility of the object factor, and that where the object has seized, immobilized and the danger of flight or destruction of evidence has been rendered non-existent for all practical purposes, then any search conducted of the object shall be preceded by a judicially issued warrant. Respondent contends that this proposed rule would alleviate the confusion which seems to pervade the entire area. It enhances the integrity of the Fourth Amendment; it protects the citizen by interposing the judiciary between he and the executive; it protects law enforcement by interposing the sanction of the judiciary; and it serves the judiciary by limiting the scope of the review of the search to the supporting documents.

That *Robbins* v. *California, infra,* in its plurality and concurrence reached the correct result. That any meaningful reconsideration would require that the "automobile exception" as to moving objects and personal property contained therein be confined to the exigent circumstance of mobility, which circumstance has ceased to be viable when the object is immobilized and the danger of flight or evidence destruction is rendered, for all practical purposes, remote or non-existent.

B. The Fourth Amendment requires agents of the government to respect the individual's expectation of privacy. The soundest way to ensure that protection is to require that all searches be made with the concurrence of a neutral and impar-

tial magistrate. This concurrence is made in the form of a search warrant. Because of the critical importance that a warrant plays in the protection of Fourth Amendment rights, the general rule is that warrantless searches are *per se* unreasonable.

While there are exceptions to the warrant requirement, these unusual situations must be justified by law enforcement authorities. Such a demonstration of societal need requires that the person seeking to exempt himself from the warrant requirement provide a compelling reason to limit the application of the Fourth Amendment. Compelling reasons have, in the past, been found in the need to preserve evidence from loss or destruction and the protection of law enforcement agents from personal danger. The basis for establishment of these exigent circumstances are, due to the deference paid to the mandate of the Fourth Amendment, very limited.

The Fourth Amendment requires a warrant in all cases where it is practical to obtain one. The reasonableness of a search is no substitute for the lack of a warrant where there is no compelling reason for the warrant's absence. The present search was made without a warrant for which there was no reason — much less a compelling one — advanced for its absence.

The instant search fails to fall within any of the recognized exceptions to the warrant requirement. The most often used exigent circumstance — the automobile exception — cannot justify the warrantless search. Under either a limited view of the exception (warrants required for closed containers in a trunk) or an expansive interpretation (no warrant required for any vehicle contents), the present case involves a warrantless seizure of an automobile for the sole purpose of transporting it to the station house for the warrantless seizure of a paper bag. The reasoning of the automobile exception (mobility, loss, destruction) cannot apply to an automobile taken into police custody for the singular purpose of a seizure of a container in a locked trunk. Nor do any other exceptions justify the present search.

Absent a failure to satisfy any of the recognized exceptions, the petitioner in the present case has sought to create a new one — an unworthy container exception. However the petitioner has elected to ignore the guidelines which this Court has previously utilized to determine the "worth" of a container for purposes of Fourth Amendment protection. Those standards do permit warrantless searches when the contents of the container are made obvious by the shape, weight or appearance. The present container satisfied none of the exceptions — its contents were not inferred by the container. Only opening the container revealed its contents. There is no exception to the warrant requirement for paper containers. The petitioner has yet to demonstrate any compelling reason to create any new exception to the rule.

Moreover the present guidelines are a workable standard upon which the lower Courts and the police officer in the street can gauge the need for a warrant. It is clear that the present guidelines would require a warrant in the instant case. The petitioner has failed to advance any justifiable reason to modify those rules. In addition, the experience to date provides several reasons (e.g. — provides reasonably clear rules that allow a case-by-case examination) for the maintenance of such guidelines.

ARGUMENT

I

ROBBINS v. *CALIFORNIA* WAS CORRECTLY DECIDED

In the Order of the Court granting certiorari in this case, the parties were asked to address the issue as to whether *Robbins* v. *California*, No. 80-148, should be reconsidered. For the reasons stated below, respondent contends that *Robbins* was correcty decided. There was, of course, no majority opinion, and that any reconsideration of *Robbins* should be toward achieving a majority or hopefully a unanimous opinion setting forth principles which would uphold the judgment in the case of the present respondent.

The plurality opinion in *Robbins, supra,* reaffirmed this Court's previous holdings that ". . . a search is *per se* unreasonable, and thus violates the Fourth Amendment, if the police making the search have not first secured from a neutral magistrate a warrant that satisfies the terms of the warrant clause of the Fourth Amendment . . ." *Robbins* v. *California,* opinion of Justice Setwart, citing *Agnello* v. *United States,* 269 U.S. 20, 33 (1925); *Katz* v. *United States,* 389 U.S. 347, 357 (1967). The opinion noted the exceptions and identified as one of the exceptions, "the so-called 'automobile exception.' "

The automobile exception had its genesis in the case of *Carroll* v. *United States,* 267 U.S. 132 (1925) which upheld the warrantless search of an automobile, which was stopped by law enforcement officers who believed that it contained contraband. Warrantless searches have been upheld by the Court after the vehicle was seized and removed to a police station. *Chambers* v. *Maroney,* 399 U.S. 42 (1970); *Texas* v. *White,* 423 U.S. 67 (1975). This exception was reaffirmed and the aforesaid authorities cited by this Court as recently as October 20, 1980, when the Court vacated and set aside a judgment of the Supreme Court of Colorado which had affirmed the trial court's granting of a motion to suppress evidence. *Colorado* v. *Bannister,* No. 79-1901. In that case, a police officer observed in plain view, stolen property inside a vehicle which had been stopped.

In summarizing the "automobile exception" to the warrant requirement, Chief Justice Burger in writing for the majority in *United States* v. *Chadwick,* 433 U.S. 1 (1977) noted that the treatment of automobiles was based "in part on their inherent mobility," but that warrantless searches of automobiles were sustained "in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not non-existent." citing *Cady* v. *Dombrowski,* 413 U.S. 433, 441-442 (1973); *South Dakota* v. *Opperman,* 428 U.S. 364, 367 (1976), (as well as *Chambers, supra* and *Texas* v. *White,*

supra.) The latter was based on a "diminished expectation of privacy" concept as it pertains to automobiles. The decision of *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) made the observation that a person has a lesser expectation of privacy in an automobile because its function is transportation and "seldom serves as one's residence or as the repository of personal effects." That it travels with "its occupants and contents in plain view."

The Chief Justice in *Chadwick*, *supra*, went on to note other factors which had been recognized by the court, namely, state regulation of motor vehicles, *Cady* v. *Dombrowski*, *supra*, at 441, as well as custodial acquisition by authorities "in the interest of public safety." *South Dakota* v. *Opperman*, *supra*, at 368.

In summary it appears that the "automobile exception" is predicated upon three factors: (1) inherent mobility, (2) diminished expectation of privacy and, (3) state or governmental regulation of motor vehicle operation.

That with regard to luggage, *Chadwick* holds that there is no diminished expectation of privacy in luggage; it is not subject to governmental regulation, and its mobility evaporates when it is seized by law enforcement officers. *Chadwick*, of course, was reaffirmed in *Arkansas* v. *Sanders*, 442 U.S. 753 (1979).

In Robbins, the plurality in discussing the government's argument that the nature of a container may diminish the Constitutional protection, rejected that notion holding that the argument is not supported by the Fourth Amendment in that the Amendment protects "people and their effects . . . whether they are 'personal' or 'impersonal.' " The opinion also recognized the difficulty if not the impossibility of setting up an objective criteria as to the types of containers in which an expectation of privacy is manifested and in which it is not.

Justice Powell, although concurring in the judgment, could not accept a "bright line" rule that would require officers to obtain warrants for "insubstantial containers in which no one had a reasonable expectation of privacy." Justice Powell concurred in the judgment because of the facts of the case at hand which he felt evidenced a manifestation of privacy. He recognized "the central purpose of the Fourth Amendment is to safeguard reasonable expectations of privacy."

As was reiterated by Chief Justice Burger in *United States* v. *Chadwick, supra,* ". . . the Fourth Amendment 'protects people, not places, *Katz* v. *United States*, . . . more particularly, it protects people from unreasonable government intrusions into their legitimate expectations or privacy . . ." *Id.* at 7.

The principle that the Fourth Amendment seeks to protect individual expectations of privacy from governmental intrusion is simple enough. The difficulty arises in attempting to apply that principle to the infinite encounters between the individual and agents of that government.

Robbins v. *California, supra,* highlighted the difficulty as it relates to individuals and motor vehicles. The plurality opinion has been characterized as having established a bright line test as to closed, opaque containers. (Concurring opinion of Justice Powell). Justice Blackmun felt that it would be better "to adopt a clear cut rule to the effect that a warrant should not be required to seize and search any personal property found in an automobile that may in turn be seized and searched without a warrant pursuant to *Carroll* v. *United States* . . . and *Chambers* v. *Maroney*." Justice Rehniquist expressed a similar view. Justice Stevens expressed: "In my opinion, the 'automobile exception' to the warrant requirement therefore provided each officer the authority to make a thorough search of the vehicle — including the glove compartment, the trunk, and any containers in the vehicle that might reasonably contain contraband." It was further stated by the dissent (Mr. Justice Stevens) that neither

Chadwick nor *Sanders* were automobile exceptions cases, but that the relationship between the automobile and the article seized was purely coincidental.

In respondent's view the real problem in all of these cases is a reliance on an "automobile exception" rule — a rule which would permit the warrantless search of a motor vehicle regardless of whether the search is conducted at the scene or at another place. *Chambers* v. *Maroney*, *supra*. Perhaps it is *Chambers* that should be reconsidered that there be a reassessment of what *Carroll* v. *United States*, *supra*, really decided.

Carroll, *supra*, involved the warrantless search of an automobile upon probable case that it contained illegal liquor. The principle justification for the warrantless search and seizure as respondent views the opinion was the fact that a motor vehicle had mobility and that exigent circumstances exists justifying the warrantless search. Furthermore, an Act of Congress permitted the seizure of the contraband.

In *Preston* v. *United States*, 376 U.S. 364 (1964), this Court recognized that searches involving vehicles and other movable items were subject to different treatment from searches involving fixed objects like houses. Citing *Carroll*, *supra*. The question was whether the search of the vehicle was unreasonable. An inquiry must be conducted to determine whether the facts of a case were such that the search fell within any of the exceptions to "the Constitutional rule that a search warrant must be had before a search may be made."

Recognizing that warrantless searches and seizures incidental to a lawful arrest are justified, the Court went on to note that "these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest."

The Court went on to note that the petitioner and his companions had been arrested and taken into custody and the car had been towed to a garage. There was no danger that the arrestees could have used a weapon in the car or could have destroyed evidence of crime.

Dyke v. *Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968) involved a search remote in time from arrest. The Court recognized the fact that because of the mobility of vehicles, they may be searched without a warrant "upon facts not justifying a warrant less of a residence or office." Citing *Carroll, supra,* and *Brinegar* v. *United States*, 338 U.S. 160 (1949). The Court pointed out that the officers have "reasonable or probable cause" to believe "that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search."

Dyke, supra, recognized the authority of *Preston, supra,* concerning the invalidity of a search conducted "too remote in time or place to (be) incidental to the arrest."

The case of *Chambers* v. *Maroney, supra,* constituted, in respondent's view, a change in the Court direction in the field of warrantless searches of vehicles.

The Court in *Chambers, supra,* sought to distinguish *Preston, supra,* on the grounds that the arrest in that case was for vagrancy and "it was apparent that the officers had no cause to believe that evidence of crime was concealed in the auto." In *Dyke, supra,* there was a rejection of the suggestion of probable cause to search the car. Reciting extensively from *Carroll, supra,* and concluding that *Carroll, supra,* held that "a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained . . . an immediate search is constitutionally permissible." The majority con-

cluded: "for constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."

The dissent of Mr. Justice Harlan observed that "the 'general requirement that a warrant be obtained' is basic to the Amendment's protection of privacy and 'the burden is on those seeking (an) exemption . . . to show the need for it.'" Such exemptions are searches incident to arrest and the mobility of a vehicle stopped on a highway.

It appears from a reading of *Chambers*, *supra*, that mobility is not the sole criteria for searches of vehicles, but that upon a finding of probable cause, vehicle searches conducted at another place for the safety or the convenience of the officers are permissible even though there was opportunity for the obtaining of a search warrant. The mobility factor pertained not only on the highway, but at the station house, even though conceivably the vehicle could be immobilized until a warrant was obtained. Because vehicles are different from houses, the *Chambers* majority sustained as reasonable the station house search of the vehicle.

It seems to respondent, that the exigent circumstance doctrine permitting warrantless searches in certain limited situations has been held inapplicable to vehicles where the exigency has ceased to exist because of the removal of the vehicle from the highway to a more secure location. The original justification for a warrantless search of a vehicle stopped on the public highway involved a mobility factor which evaporates when the officers have secured complete custody of the vehicle. Such seems to be the import of *Preston*, *supra*. But since *Chambers*, *supra*, no warrant is required for a search of a vehicle at another more secure place. If a vehicle is involved and the officers have

probable cause, the search can be conducted either at the scene of seizure or at a latter time.

Respondent submits that this ruling constituted a departure from what Justice Harian referred to as "the framework of . . . past decisions circumscribing the scope of permissible search without a warrant."

That following *Chambers, supra,* came *Texas* v. *White, supra, Cady* v. *Dombrowski, supra; South Dakota* v. *Opperman, supra* and *Cardwell* v. *Lewis, supra,* wherein another concept of "lesser expectation of privacy in an automobile" evolved.

Respondent contends that "the lesser expectation of privacy" concept is no longer a valid concept and perhaps never was. An automobile is an article of personal property. It is true that it is a means of transportation, but transportation is a necessity for those living outside urban areas who must depend on automobile transportation to carry them to their places of livelihood. Automobiles themselves do become the repository of personal effects. Automobiles for the most part have locks, closed compartments and trunks. That state regulation of motor vehicles is aimed primarily at identification of vehicles by license number and inspection toward regulating the safe operation of vehicles on the highways. This type of regulation does not interfere with those areas of a vehicle wherein a manifestation of privacy might be expected. (trunk, glove compartment, etc.)

In *Cardwell* v. *Lewis, supra,* the Court reiterated that the protection of privacy was the primary object of the Fourth Amendment, and that its purpose was to "shield the citizen from unwarranted intrusions into his privacy." Stating that the Court had recognized a difference between warrantless searches and seizures of automobiles and fixed premises because of the former's mobility, the plurality opinion cited a "lesser expectation of privacy" factor in motor vehicles, but pointed out that

the interior of the vehicle was not involved in the case and recognized a Fourth Amendment protection extending to motor vehicles. In a footnote (note 8) the plurality observed:

> Again we are not confronted with any issues as to the propriety of a search of a car's interior. "Neither *Carroll, supra*, no other cases in this court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords."

Cardwell, of course, involved an examination of the exterior of a vehicle after it had been removed to a police impoundment lot. The plurality held that a warrant was not required, relying on *Chambers, supra*. Justice Powell concurred in the result without addressing the issue.

The dissent recognized the *Carroll* doctrine that a moving vehicle on an open road creates an exigent circumstance situation. However, the dissent felt that *Carroll, supra*, was inapplicable because there was "no reasonable likelihood that the automobile would or could be moved." citing *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) and *Preston, supra*.

The lesser expectation of privacy concept was confined to the fact that a motor vehicle's function is transportation and that it seldom serves as a repository of personal effects and that it does not escape public scrutiny when it travels in public.

Respondent would contend that although a motor vehicle would not necessarily be a permanent repository of personal effects, personal effects may be placed in an automobile, hidden from public view (like in the trunk or other closed compartments) and that such a manifestation of an expectation of privacy is just as great as when one temporarily places personal effects in a suitcase, footlocker or other luggage container. *United States* v. *Chadwick, supra, Arkansas* v. *Sanders, supra*, dealt directly with the such articles.

As aptly stated in *Coolidge* v. *New Hampshire, supra,* "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away . . ." at 461. A search of a motor vehicle or automobile constitutes a "substantial invasion of privacy." *United States* v. *Ortiz,* 422 U.S. 891 (1975).

In *South Dakota* v. *Opperman, supra,* the majority of the court upheld a search of a vehicle during a routine inventory conducted of the vehicle which had been impounded for parking violations.

The court categorized the circumstances under which warrantless searches of automobiles could be conducted. First, because of the inherent mobility of automobiles an exigent circumstance permitted the warrantless intrusion. This, of course, was the *Carroll, supra* doctrine. The *Chambers, supra,* extension of *Carroll, supra* permits the warrantless search even where there is no danger of removal from the jurisdiction. The second circumstance involves the concept that there is a lesser expectation of privacy in motor vehicles as stated by the plurality in *Cardwell* v. *Lewis, supra.* The third circumstance is two pronged, as respondent views the decision. The first prong is a public safety consideration referred to by the Court as "community caretaking functions." citing *Cady, supra.* Wherein automobiles are taken into police custody as the result of accidents, to permit the flow of traffic, to preserve evidence, and to remove damaged or disabled vehicles from the thoroughfares. Following the impoundment of a vehicle, a routine inventory is permitted. In this latter instance, the impoundment and the inventory are many times conducted where there is no suspicion of criminal activity other than violations of municipal ordinances pertaining to traffic enforcement. In other instances criminal activity is directly involved. *Cooper* v. *California,* 386 U.S. 58 (1967) (inventory conducted after impoundment under a state forfeiture statute). *Cady* v. *Dombrowski, supra.* (vehicle impounded following owner's arrest for drunk driving

and where owner was incapacitated.); *Harris* v. *United States*, 390 U.S. 234 (1968) (owner arrested for robbery and vehicle impounded as evidence.)

That the opinions in *Cady, supra, Cardwell, supra,* and *Opperman, supra,* were not without dissent indicating that the whole area of searches and seizures involving automobiles has divided this Court as to what is and what is not proper where a warrant was not precured prior to the search.

As respondent reads *Chadwick, supra,* and *Sanders, supra,* there is a distinction between searches of certain items seized from a motor vehicle and the vehicle itself, the rationale being that there is a greater expectation of privacy in certain types of containers (those which are repositories of personal effects) than in a motor vehicle, and that the immobilization of the seized container requires the intervention of a judicial officer and the procurement of a warrant before a search can be conducted.

In *Sanders, supra,* the majority opinion in a concluding footnote further differentiated between containers and vehicles stating that transportation and impoundment of vehicles seized on the highway awaiting the procuring of a warrant might impose severe and impossible burdens on many police departments. (note 14). However, respondent sees no difference between the burdens imposed upon police departments who impound vehicles for the considerations expressed in *Opperman, supra,* and *Cady, supra,* (i.e. to promote safety on the highway or to safeguard private property) and the burden imposed upon the same entities while awaiting the judicial mandate of a search warrant.

Respondent submits that a reading of the foregoing authorities shows that although there has been a consistent adherence to the mandate that warrantless searches are unreasonable, *per se* unless conducted within one of the few, well delineated

exceptions, the division of opinion as to when those exceptions apply, especially where moving vehicles are involved, requires that a workable rule be established which operates within the constitutional mandate of the warrant clause of the Fourth Amendment.

Respondent suggests that the exception to the warrant requirement where movable objects are involved should be based solely upon considerations of the inherent mobility of the object and the exigencies created by that factor. That where the object seized has been immobilized and the danger of flight or the destruction of evidence has been rendered non-existent for all practical purposes, then any search conducted of the object shall be preceded by a warrant issued by a judicial officer. That the foregoing suggested principle should pertain to any movable object when its inherent mobility has evaporated because it has been effectively immobilized. The intervention of a judicial officer preserves and perpetuates the terms of the warrant clause of the Fourth Amendment. It protects the citizen whose property is the subject of search and seizure by interposing the judiciary between he and the executive. It protects the law enforcement officer by interposing between he and the search the sanction of the judiciary. It serves the judicial system by limiting review of a search conducted pursuant to a warrant to the documents in support thereof unless an aggrieved person can satisfy the rigid requirements of *Franks* v. *Delaware*, 438 U.S. 154 (1978). And last, but not least, it fulfills the mandate of the Constitution which is the bedrock of our political and judicial system.

Although it has been stated that suitcases, and the like even though found in automobiles do not involve the "automobile exception" as was stated in *Sanders, supra*, at 442 U.S. 767, the dissenters in *Robbins, supra*, seem to indicate otherwise. (Dissenting Opinions of Mr. Justice Blackmun, Mr. Justice Rehnquist, and Mr. Justice Stevens). As respondent reads their

opinions, the "automobile exception" should include any and all personal property found inside a stopped vehicle.

For the above reasons, respondent reiterates that only the exigent circumstance of inherent mobility should govern the search of movable objects without a warrant under *Carroll, supra,* and that once the exigency no longer exists, because of the immobilization of the object, then the intervention of a warrant is required.

Respondent submits that *Robbins, supra,* was correctly decided and that reconsideration toward achieving a standard suggested by respondent involving movable objects, would in respondent's view be a step toward eliminating the confusion that seems to prevade this entire area.

II
THE FOURTH AMENDMENT PROTECTS CONTAINERS OF THE TYPE FOUND IN THE CIRCUMSTANCES OF THE PRESENT CASE

Respondent believes that the court below correctly concluded that suppression of the paper bag was required by the Fourth Amendment. The decisions by this Court in *Chadwick* and *Sanders, supra,* upon which the circuit court below relied, demonstrate the rationale for such a result. The petitioner proposes in its brief, as it has in prior cases, to radically expand the non-warrant exemptions of the Fourth Amendment and thus drastically limit the protection to all citizens which the Amendment should provide. Respondent believes that such a suggested expansion is neither warranted by the arguments advanced by the petitioner nor in the best interests of a free society.

A. Warrantless Searches Are Per Se Unreasonable

On countless occasions, this Court had decided cases that, "reflect the settled Constitutional principle . . . that a fundamental purpose of the Fourth Amendment is to safeguard

individuals from unreasonable government invasions of legitimate privacy interests." *Chadwick, supra*, 433 U.S. at 11. This safeguard manifests itself in the warrant clause of the Amendment. The prominent place that the warrant requirement is given in this Court's decisions is indicative of the "basic Constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government." *United States* v. *United States District Court*, 407 U.S. 297, 317 (1972).

It is because of the critical importance of the warrant that the Court has often concluded that a "search is *per se* unreasonable, and thus violates the Fourth Amendment, if the police making the search have not first secured from a neutral magistrate a warrant that satisfies the terms of the warrant clause of the Fourth Amendment." *Robbins* v. *California*, ____ U.S. ____ 69 L.Ed.2d at 748, 101 S. Ct. at 2844 (1981). *See*, e.g. *Katz* v. *United States*, 389 U.S. 347 (1967), *Agnello* v. *United States*, 269 U.S. 20 (1925). Thus, the Amendment requires that normally searches of private property be performed pursuant to a search warrant issued in compliance with the warrant clause. *Arkansas* v. *Sanders*, 442 U.S. 753, 758 (1979).

The petitioner in its brief attempts to sidestep this fundamental principle by arguing the reasonableness of the present search. However as the circuit decision below correctly observed, the reasonableness of a search in light of the surrounding circumstances does not obviate the need for a warrant. (Appendix p. 20a) Respondent would emphasize that in the ordinary case, a search of private property must be both reasonable and made pursuant to a properly issued search warrant. Mere reasonableness is not a substitute for the judicial warrant required under the Fourth Amendment. *Sanders*, *supra*, 442 U.S. at 758. Thus, the court in *Sanders*, relying upon *Coolidge* v. *New Hampshire*, *supra*, concluded whether or not the search would be reasonable, the warrant requirement operates "as a matter of course." *Id.* at 758.

Beginning with the initial premise that warrantless searches are *per se* unreasonable, respondent recognizes that the warrant requirement does have exceptions. *Chimel* v. *California*, 395 U.S. 752 (1969) (search of area incident to arrest); *Terry* v. *Ohio*, 392 U.S. 1 (1968) (protective pat-down for weapons); *Carroll* v. *United States*, 267 U.S. 132 (1925) (search of automobile). The exceptions, however, are few and carefully delineated. *Katz*, *supra* at 357. Yet it is the presence of that initial premise that results in two predicates applicable to every proposed exception: First they must serve the legitimate needs of law enforcement officers to protect their own well being or preserve evidence from destruction. *United States* v. *United States District Court*, *supra*, at 318. Secondly, because every exception infringes, to some extent, upon the protective reach of the Fourth Amendment, the burden is on those seeking the exemption to demonstrate the need for it. *United States* v. *Jeffers*, 342 U.S. 48, 51 (1952).

Respondent submits that the petitioner has failed to adequately address either of these predicates and thus is unable to establish any new exception to justify the instant search.

B. A Person Who Safeguards His Possessions Is Due The Protection Of The Fourth Amendment

The Petitioner contends in its brief to this Court that the circuit court decision below resulted in a sweeping extension of the warrant requirement. (Petitioner brief at p. 9) This is a result of the government's belief that only unreasonable searches require warrants. Respondent believes that, to the contrary, any person who manifests an intention to safeguard his property is due, with only very limited exceptions, the protection of the Fourth Amendment.

The Respondent in the present case took several steps to manifest his intention of privacy for the paper bag container. First, he utilized a container which was opaque, thus depriving

the general public of any plain view of the contents. Second, the integrity of the container had not been breached by tears, rips or holes. This demonstrated the respondent's intention to utilize a secure container. Thirdly, he had closed the container, once again depriving outside eyes any view of the contents. Finally, he secured the container in the locked trunk of his automobile — thus performing a ritual which countless millions of motorists perform daily — locking valuables in the trunk of a car.

The Court concluded in *Chadwick* that a person who manifested such an expectation that the contents of a container would remain free from public examination is due the protection of the Fourth Amendment. 433 U.S. at 11. It should be noted that although the container in Chadwick was itself locked (as opposed to being within a locked automobile trunk) it clearly did not have the same degree of integrity as in the present case — since it leaked its contents at the San Diego train station in such amounts as to alert drug agents of a possible violator. 433 U.S. at 3. [2]

The protection of the Amendment to the present case was reinforced by *Robbins, supra,* which did not require the container to be either luggage nor locked in order to invoke the warrant requirement. 69 LEd.2d at 748, 101 S. Ct. at 2844. Nor was the suitcase in *Sanders, supra,* locked. 442 U.S. at 755. The reasoning of the Chief Justice in his concurring opinion in *Sanders* establishes the need for Constitutional protection when he wrote that an "owner has the right to expect that the contents of his luggage will not, without his consent, be exposed on demand of the police." 442 U.S. at 767. While the government argues in its brief that the warrantless search of a container of "one innocent of wrongdoing" would be only a minor gov-

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[2] Another example of sealed containers which were suppressed (plastic bags) despite the fact that some had tears and holes through which marijuana debris and stems protruded can be found in *United States* v. *Rivera,* 654 F.2d 1048 (5th Cir. 1981).

ommental intrusion, (Petitioner's brief at p. 12), the Chief Justice's concurrance in *Sanders* replies that:

> If not carrying contraband, many persons arrested in such circumstances might choose to consent to a search of their luggage to obviate any delay in securing their release. But even if wholly innocent, some persons might well prefer not to have the contents of their luggage exposed in a public place. They may stand on their right to privacy and require a search warrant. The warrant requirement is not so onerous as to command suspension of Fourth Amendment guarantees once the receptacle involved is securely in the control of the police, as it was here after Sanders' arrest.

442 U.S. at 767.

As respondent argues below, the present case does not come within the parameter of the automobile exception to the warrant clause. The search of which the respondent complains is that of the paper bag container, not of the automobile or the locked trunk. Thus, as in *Chadwick* and *Sanders*, it is the container searched, rather than the vehicle which is controlling. 442 U.S. at 767. Certainly the petitioner would not advocate a warrantless search of the paper bag if it were found in a locked closet of the respondent's home. As in the prior cases, the respondent's vehicle is incidental to the search and does not form an integral element. The presence of the automobile does however serve to demonstrate an important aspect of the respondent's intentions — he placed the container in the most secure section of the automobile, outside the reach of even the most curious public view and in a place which is usually immune from any official inspection.[1]

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[1] The usual reasons given for a lesser expectation of privacy in an automobile have yet to be applied to personal property inside a container in a locked trunk. *See Cardwell v. Lewis*, 417 U.S. 583 (1974) (Object of search in plain view); *Cady v. Dombrowski*, 413 U.S. 433 (1973) (Regulation of condition and operation of motor vehicles on public streets); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (Periodic official safety inspections).

Thus, by any of the standard measures, the respondent undertook a course of action which identified the container as an item in which he expected a secure privacy interest. The Fourth Amendment demands that he, and all other citizens subsequent to this case, be assured of the protection of that privacy interest.

C. The Present Container Is Worthy Of The Protection Of The Fourth Amendment

The major thrust of the petitioner's argument in its brief to this Court is that the nature of the respondent's container should determine whether or not it deserves protection of the Fourth Amendment. This argument is often times referred to as the "worthy container rule." The *en banc* opinion below considered this argument and rejected its application (Appendix p. 23a - 25a). Respondent believes that such a result is well founded in both law and logic and urges this Court to likewise reject the proposed exception to the warrant requirement.

The crux of petitioner's argument is that the nature of the paper bag container cannot support an expectation of the protection of the Fourth Amendment.[4] The petitioner attempts to draw support for this position from a footnote contained in the *Sanders* opinion. That note observed that "[n]ot all containers and packages found by the police during the course of a search will deserve the full protection of the Fourth Amendment." 442 U.S. at 764 n. 13

The circuit court decision below disposed of the government's argument on both practical and philosophical grounds. First it noted that, with limited exceptions, the Fourth Amend-

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[4] Once again the petitioner has adopted the attitude that the subject of a search must justify his reason for Fourth Amendment protection rather than the person conducting the search having to justify the exception to a warrantless search. Respondent suggests that the protection of the Fourth Amendment is a right granted to all of society and it is the person who proposes to limit that right who must justify his action as an exception to that protection.

ment applies to all personal items. Absent any of those exceptions, an issue addressed by respondent below, a warrant is required. There is no recognized exception for a warrantless search of a closed paper bag. The circuit court declined the government's invitation to create a new exception to the Fourth Amendment for such containers. The government now advances that same proposition to this Court in the hope of carving out of the warrant requirement a new "paper bag" exception.

The underlying basis for such a proposition is singular — some containers do not merit Fourth Amendment protection and a paper bag is in such a category. However neither case law nor practical realities support such a theory. The current test for the need for a warrant can be found in the *Sanders* opinion. Some containers do not merit Fourth Amendment protection because their contents can be inferred from their outward appearance. Other containers will expose their contents to plain view. 442 U.S. at 765 In either case, the container does not merit protection of a warrant because its condition manifests no indicia of the owner's desire to retain a privacy interest in the contents. The present container, irrespective of its construction, clearly implies an expectation of privacy. The contents were not open to plain view. (Appendix p. 26a) Nor did the appearance or feel of the paper bag imply its contents (Appendix 25a). To suggest, as the petitioner now does, that the container is void of any Fourth Amendment protection solely because it is constructed of paper is to ignore the realities of everyday life.[5]

Certainly the petitioner would not advocate that letters could be read by government agents without a warrant because they

[5] See for example, *United States* v. *Dien*, 609 F.2d 1038 (2nd Cir. 1979) affm'd on rehearing 615 F.2d 10 (1980). In *Dien*, although the cardboard boxes were taped closed they failed to contain the odor of marijuana. Despite this lack of integrity as to their contents the Third Circuit found sufficient indicia of privacy solely because they were placed in the cargo section of a van, the inside of which could not be viewed from the street. *Id.* at 1045

are enclosed only in paper envelopes. This Court has ruled that, absent a warrant, only outward inspection of form and weight are permitted whenever papers are "closed against inspection wherever they may be." *Chadwick* 433 U.S. at 10, citing *Ex Parte Jackson*, 96 U.S. 727 (1878). The petitioner advances no reason why a paper envelope that does not disclose its contents should be treated with any more respect than a paper bag which reveals nothing of its contents. Respondent suggests that on the facts of the present case, there can be no distinction. [6]

The second reason for which the court below rejected the petitioner's suggestion for a paper bag exception was a practical one. Observing that the Fourth Amendment must speak to the officers on the street in an intelligent manner (App. p. 23a), the court concluded that any "unworthy container" rule would be unworkable. Since the "worth" of any container for Fourth Amendment purposes would have a near infinite set of values depending on time, place, circumstance and person, any test for "worth" would be ineffective in the courthouse and unusable in daily street encounters by police. The attributes of various containers listed in the court's opinion (App. 24a) demonstrate the folly of a "worthy container" rule. *See also, United States* v. *Moschetta*, 646 F.2d 955 (5th Cir. 1981) *cert.* pending.

Petitioner suggests no substitute for the container test of *Sanders* noted above. Rather, the petitioner seeks to remove any ambiguities by limiting the protection of the warrant clause only to luggage [7] and expand the recognized exceptions to cover

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[6] Petitioner makes much of the fact that a paper container may reveal its contents due to spillage, handling or the passage of time. (Petitioner's brief at p. 34) The speculative nature of this argument is highlighted by the fact that none of these possibilities were present in the instant case. Moreover many containers which the petitioner views as more substantial would be subject to the same caveat i.e. a piece of luggage which springs open spilling its contents when it is accidently dropped or mishandled.

[7] Of course, even luggage may be searched without a warrant if exigent circumstances are present. See, *United States* v. *Kreimes*, 649 F.2d 1185, 1190-91 (5th Cir. 1981).

all other containers.[*] Clearly, the Fourth Amendment does not limit its protection only to luggage, as demonstrated by the Court's opinion in *Robbins, supra*. Respondent suggests that the circuit court's resolution of ambiguities is the more sound alternative since it is the only method by which the full protection of the warrant clause can be obtained.

Moreover, the decision has a solid basis in prior decisions by this Court. In articulating a standard which is equally applicable to the container in the present case, the Court concluded in 1967 that:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *See, Lewis* v. *United States*, 385 U.S. 206, 210; *United States* v. *Lee*, 274 U.S. 559, 563 But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *See, Rios* v. *United States*, 364 U.S. 253; *Ex parte Jackson*, 96 U.S. 727.

Katz v. *United States*,
389 U.S. 347, 351-352 (1967)

Petitioner raises an additional argument in this area to which respondent would reply. Petitioner urges that paper containers are used "simply to facilitate the movement of merchandise, or to contain bulk items," and thus not repositories of personal effects thereby meriting less Fourth Amendment protection. (Brief at p. 35) Initially, respondent notes that the Fourth Amendment protects a person, his house, papers and effects from unreasonable searches and seizures. There is no exception to the warrant requirement which permits warrantless searches simply because the personal effects may be in "bulk" or may be

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[*] As to what some courts have viewed as luggage see generally, *United States* v. *Rigales*, 630 F.2d 364 (5th Cir. 1980) (leather case); *United States* v. *Bloomfield*, 594 F.2d 1200 (8th Cir. 1979) (knapsack) See also, *United States* v. *Ross*, 655 F.2d 1159 (D.C. Cir. 1981) Tamm dissent at p. 1174 n.3

classified as "merchandise." By painting such an impersonal relationship with the container, the petitioner apparently hopes to refute the circuit court's conclusion that paper bags do often contain very personal property. (App. 24a, n. 30) Moreover the argument is refuted by the petitioner's brief itself later when it admits (as it must) that a "common grocery bag or a similar container may at times be pressed into service as a repository of personal effects." (Brief at p. 36) The petitioner's answer to such a fact of daily life is to counter that the "theoretical possibility of such a typical use" does not justify Fourth Amendment protection. The reply however, ignores one of the very reasons that the circuit court rejected the same argument below — "It would snare those without the means or the sophistication to use worthy containers." (App. p. 24a) By suggesting that this court resolve any difficulties in interpretation against the protection of the Fourth Amendment the petitioner has once again, run roughshod over the guiding principles of the Amendment.

In evaluating the present container's indicia of privacy, a comparison with past cases may be instructive. In *Katz, supra,* the Court held in favor of warrant when the person performed the simple act of closing a glass telephone booth door and inserting a coin into the telephone coin box. 389 U.S. at 352 The present respondent undertook actions that are of no lesser significance than Mr. Katz to demonstrate his expectation of privacy. The presence of a securing device such as a lock is no talisman of privacy for warrant purposes as demonstrated by *Robbins, supra*. In like fashion, containers of far less integrity have been protected by the warrant requirement. *Chadwick, supra*.

Petitioner's insistence that a paper container may be elevated from its "low-privacy uses" only by additional significant actions (Petitioner's brief at p. 37) indicates that petitioner has missed the point of the Fourth Amendment. To award Fourth

Amendment protection *only* when someone has marked his container "private-do not open" or secreted the container behind a plywood wall, (Petitioner's brief at p. 37 n. 21) is to impermissably shift the burden of protection and denigrates the importance of the rights involved.

Nor do the cases cited by the petitioner from the Courts of Appeal support such a proposition. Those cases either fit within the rationale of *New York* v. *Belton*, ____ U.S. ____ , 69 LEd.2d 768, 101 S.Ct. 2860 (1981), or rely upon true exigent circumstances (i.e. unauthorized removal or destruction of evidence). Thus, the decisions do not turn upon the fact that the containers were constructed of paper. For example, the petitioner refers to the following cases in its brief:

Government of the Virgin Islands v. *Rasool*, 657 F.2d 582 (3rd Cir. 1981) Search of a paper bag found in the *passenger compartment* within reach of the driver or passenger approved under the *Belton* rationale.

United States v. *Mackey*, 626 F.2d 684 (9th Cir. 1980) A case which permitted the warrantless search of a paper bag found *underneath the driver's seat* of the vehicle. *Id.* at 685

United States v. *Mannino*, 635 F.2d 110 (3rd Cir. 1981) A paper bag within a plastic bag was held admissable without a warrant because it was found on the *front seat* of the defendant's automobile, *Id* at 112; a crowd gathered at the time of the arrest which posed a threat to the security of the vehicle and its contents, *Id* at 115; and the shape and weight of the bag indicated the presence of weapons. *Id* at 112.

United States v. *Honigman*, 633 F.2d 1336 (9th Cir. 1980) Permitted the warrantless search of a grocery bag taken from a defendant who was arrested as he walked through a Safeway store parking lot. The search was upheld as one incident to arrest but the court refused to consider the expectation of privacy argument since it had not been advanced at the District Court. *Id.* at 1338.

United States v. *Goshorn*, 628 F.2d 697 (1st Cir. 1980) Approved the warrantless search of evidence found in a paper bag in a trunk. The court found that because the defendant was not the owner of the vehicle nor made any claim to the trunk's contents, he could not claim any expectation of privacy to justify warrant protection. The court remanded the case to the District Court to allow the defendant to make such a showing. *Id.* at 701.

United States v. *Portillo*, 633 F.2d 1313 (9th Cir. 1980) The court permitted a warrantless search of two paper bags in a vehicle trunk because the officer making an inspection of the vehicle pursuant to a highway safety stop concluded *without opening the bags* that they contained weapons. *Id.* at 1315-16.

United States v. *Markland*, 635 F.2d 174 (2nd Cir. 1980) The court approved a warrantless search of a "plastic, zippered beverage container bearing a 'Schlitz' beer logo" because it was scattered on the ground due to a highway accident involving the defendant. The court permitted the officer to inspect the contents of the container as a protective measure before he placed the item in his patrol car. *Id.* at 176.

United States v. *Bush*, 647 F.2d 357 (3rd Cir. 1981) Allowed search and seizure of items found in a card board box in a vehicle trunk because the top was off the box and the *contents were exposed* to plain view. *Id.* at 371.

United States v. *Sutton*, 636 F.2d 96 (5th Cir. 1981) Allowed search of a paper bag found in plain view within the *passenger compartment* of a vehicle when that bag displayed its contents by reason of its obvious markings (pharmacy bag). *Id.* at 99-100.

United States v. *Brown*, 635 F.2d 1207 (6th Cir. 1980) Permitted warrantless search of automobile trunk because the stop took place during rush hour traffic on a very busy thoroughfare and thus, there was "a very real danger that any stolen goods being transported in the automobile would be secreted or

melted down." *Id.* at 1210. Neither the automobile nor the defendant were taken into custody. *Id.* at 1209.

Finally, while admitting that protected expectations may exist at times in paper bags, the government concludes that because such use will only occur occasionally that full protection is not warranted. (Brief at p. 36) Such a position does a disservice to the words used in *Sanders* 442 U.S. at 762. The Fifth Circuit properly replied to such a position when it wrote: "The government argues that paper bags, and the like, are neither common respositories nor inevitably associated with expectations of privacy. But this is to make an absolute out of mere descriptors and to narrowly construe Fourth Amendment protections, rather than exceptions. Such reasoning would place an entire body of law upon its head." *United States* v. *Moschetta, supra,* at 961.

Moreover the very language upon which the petitioner attempts to base its argument serves to demonstrate the bankruptcy of its position. The footnote in *Sanders* upon which the government relies does not establish an "unworthy container" rule based on construction of the container — as the petitioner repeatedly suggests. Rather it clearly and without reservation tells the lower courts that those containers that do not deserve Fourth Amendment protection are those whose contents can be inferred from their outward appearance or those that expose their contents to plain view. 442 U.S. at 764 n. 13 This straight forward approach resolves most of the "possibilities" raised by petitioner in considering the various conditions of a paper container. [9] Significantly, the petitioner makes no claim that the container in the present case fell within either of the Sanders "unworthy" criteria. The fact that such a container may, in

[9] The test of *Sanders* for container protection, while not settling all possible disputes, does serve as a workable yardstick for the lower courts. *See, United States* v. *Pillo,* 522 F. Supp. 855 (M.D.Pa. 1981) (Suppression of a tupperware-type container discovered in a trunk)

some future search and seizure, satisfy the criteria does not in any way justify the conclusions that warrant protection must be withdrawn in the present case.

D. Exceptions To The Warrant Requirement Must Be Few And Rigorously Circumscribed

In considering the critical importance of the rights protected by the Fourth Amendment, Mr. Justice Jackson wrote in 1949 that:

> "These (Fourth Amendment rights), I protest are not mere second class rights but belong in the catalog of indispensible freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.
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> *Brinegar* v. *United States*, 338 U.S. 160, 180 (1949) (Jackson J. Dissenting)

Over and again this Court has emphasized that the mandate of the Fourth Amendment requires the adherence of police officers to the judicial process. *United States* v. *Jeffers*, *supra* at 51. Moreover the decisions of this Court have repeatedly held that searches conducted outside the judicial process, that is without prior approval by a judge or magistrate, are *per se* unreasonable. In *Jones* v. *United States*, 357 U.S. 493, (1958) the Court cautioned that any exceptions to the "rule that a search must rest upon a search warrant have been jealously and carefully drawn . . . " Id. at 357. The principle that any exceptions must be few and rigorously circumscribed is one of the most often repeated rubrics of Fourth Amendment decisions. *Robbins*, *supra*, 69 LE.d2 at 749; 101 S. Ct. at 2844; *Sanders*, *supra*, at 759; *United States* v. *United States District Court*, *supra*, at 318.

The exceptions which have been recognized have been required because they serve the legitimate needs of law enforce-

ment officers to protect their own well being and preserve evidence from destruction. *Id.*, at 318. The present search however, refutes any suggestion that either of the accepted reasons may serve as a basis for the instant search. In the present case, the respondent was arrested and completely controlled by the authorities. Likewise the vehicle was in the total control of the police. There was no danger of destruction of evidence; removal from police custody; or danger to the officers.

An examination of the present facts, in light of the recognized exceptions, demonstrates how far this case differs from previous exigent circumstances. Clearly the search and seizure were not performed for the arresting officers' safety. *Terry* v. *Ohio, supra*. The petitioner makes no suggestion that this is a *Terry* type search. Nor was this a search and seizure of the person incident to a lawful arrest. *United States* v. *Robinson*, 414 U.S. 218 (1973) *Robinson* permitted the search only of the person and the present search was of an automobile trunk. In addition it cannot be argued that the search was permissable under the exception of *Chimel* v. *California, supra*, since the bag in question was far beyond the respondent's control. Finally it cannot be successfully argued that the action was part of an inventory search since the police officers who conducted the search and seizure indicated that they took the car to the stationhouse for the specific purpose of seizing the bag in the trunk (H. Tr. p. 67). Thus the action is not an inventory search as defined by this Court. *Cooper* v. *California*, 386 U.S. 58 (1967). Nor does the present search come within the plain view exception since there is no contention that the bag displayed its contents by its outward appearance. *Harris* v. *United States*, 390 U.S. 234 (1968). [10] Finally, the instant facts do not satisfy the "hot

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[10] Two other exceptions to the warrant requirement, border searches *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) and administrative searches, *Camara* v. *Municipal Court*, 387 U.S. 523 (1967) have no applicability to the present situation.

pursuit" exception — for the vehicle was in the control of the police. *Warden* v. *Hayden*, 387 U.S. 294 (1967)

The only remaining exception to the warrant requirement, the automobile exception, *Carroll, supra;* does not, as respondent has argued before, apply to the present case since it was the container within the trunk that was searched without a warrant. The rule announced in the *Belton-Robbins* decisions is clear: A warrantless search of the passenger compartment is permissable at the time of arrest while a search of a non-accesible area (trunk) requires a warrant. [11] However even if this Court elects to expand the exception to all containers within a car, the extension of the automobile exception to the present search is justified neither by the original reasoning of the exception nor by the logic of the Fourth Amendment. *Carroll* based its reasoning on mobility of the vehicle — a factor not involved in the present case.

It is an axiom of Fourth Amendment law that the burden is on those seeking the exemption to show the need for it.

While the automobile exception has been extended to cases that do not strictly involve mobility problems. *Chambers, supra,* [12] the expansion of the exception beyond the true

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[11] A demonstration of the applicability of the rule can be found in *United States* v. *Russell*, 655 F.2d 1261, (D.C. Cir. 1981) (vacated January 22, 1982); in which the Court of Appeals originally suppressed a paper bag found by police in the hatchback portion of an automobile. 655 F.2d at 1264. In light of *Belton* and *Robbins* the panel on rehearing reversed itself and allowed admission of the evidence.

[12] In permitting such a warrantless search in *Chambers*, the Court did note that, "it was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and safety of his car to have the vehicle and the keys together at the station house. *Chambers, supra,* p. 52 n.10.

rationale of the exigent circumstances doctrine has never been firmly established. Chambers for example, calls its own conclusion on the permissability of a station house a "debatable question" that "arguably" could go either way and "may depend on a variety of circumstances." *Id.* at 51-52[13] *United States* v. *Jeffers, supra* at 51. Furthermore each exception must be limited to that which is necessary to accommodate the identified needs of law enforcement *Mincey* v. *Arizona,* 437 U.S. 385 (1978).

The petitioner's arguments on the burdens imposed by the warrant requirement in this case were answered by this Court's decisions in *Chadwick, supra, Sanders, supra,* and *Robbins, supra.* As the Court concluded in *Mincey* v. *Arizona:*

> Moreover, the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. Cf. *Coolidge* v. *New Hampshire, supra,* at 481, 29 L Ed 2d 564, 91 S Ct 2022. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.

Mincey, supra,
437 U.S. at 393

The search in the present case is unable to satisfy the requirements of any of the recognized exceptions to the warrant requirement. The petitioner proposes to either stretch a current

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[13] A number of commentators have likewise agreed that an expansion of the automobile exception is without foundation. *See,* e.g. *Supreme Court 1980 term,* 95 Harv. L. Rev. 91, 261 (1980); Wilson, *the Warrantless Searches: Exception without Justification,* 32 Hastings L. J. 127, 130-132, 158-59 (1980); Note, *Warrantless Searches and Seizures of Automobiles,* 87 Harv. L. Rev. 835, 845 (1974).

exception or to create a whole new one. In either case, the petitioner has failed to identify the exigent circumstances that previous exceptions have required. Mere expediency or convenience has never been an acceptable reason to disregard the requirements of the Fourth Amendment. To permit such reasons to serve as the basis for another exception is to do an extreme disservice to prior decisions of this Court and render meaningless the warrant provision of the Fourth Amendment.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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